

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CHARLES LINDSAY
Claimant

VS.

**RANDY VILELA TRUCK HAULING &
DEMOLITION**
Respondent

AND

NATIONWIDE MUTUAL INSURANCE CO.
Insurance Carrier

Docket No. 1,031,031

ORDER

Respondent requests review of the April 23, 2008 preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

ISSUES

Following a preliminary hearing the Administrative Law Judge (ALJ) ordered the respondent (rather than respondent and Nationwide Mutual Insurance Co. (carrier), its purported insurance carrier) to pay for claimant's medical treatment. He went on to suggest that claimant implead the Fund into the case as it was unclear whether respondent had insurance at the time of the claimant's injury.

The respondent requests review of this decision and claims the ALJ exceeded his jurisdiction in awarding benefits against the respondent alone and not the carrier. According to respondent's brief, had the ALJ taken judicial notice of the Division's records, which reflect coverage, and disregarded a letter offered by the carrier, (which indicates the policy had lapsed) that he would have concluded there was coverage and ordered the carrier to pay the awarded benefits. Respondent asks the Board to reverse the ALJ's decision and remand this matter for a hearing to assess costs against the carrier for the expenses incurred in defending this matter.¹

¹ At the hearing respondent argued that claimant's present bilateral carpal tunnel complaints are attributable to a 2005 motor vehicle accident. The ALJ found that the previous accident was to the neck and unrelated to claimant's present complaints. And while that issue might have been jurisdictional for the Board

Both claimant and the carrier argue that the Board does not have jurisdiction regarding a preliminary hearing order on the sole issue of insurance coverage. And claimant further argues that if the Board concludes that it has jurisdiction, then the Order should be affirmed in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

The ALJ's Order succinctly and accurately sets forth the facts surrounding this claim and will not be needlessly repeated. Suffice it to say that claimant alleges a series of repetitive injuries which he claims occurred on June 22, 2007. There have been two previous preliminary hearings and in both, the ALJ ordered respondent to pay the sought-after benefits. Due in large part to a coverage issue, those benefits have not been forthcoming. And as a result, claimant sought this preliminary hearing in order to enforce the earlier orders.

At this hearing the respondent sought to litigate the coverage issue with additional evidence that supports its contention that there is coverage for the claimant's alleged injury. Respondent also offered evidence as to claimant's earlier motor vehicle accident and his resulting neck injuries. But the issue of whether claimant's present bilateral carpal tunnel complaints arose out of and in the course of his employment was not briefed to the Board. Instead, respondent's sole focus in this appeal is the fact that the ALJ failed to rule that there was coverage under the carrier's policy for this accident. And in order to trigger jurisdiction, respondent argues that "Judge Hursh exceeded his jurisdiction in awarding benefits against [r]espondent and not the insurance carrier which, based on the facts and the Division's own records, had coverage and asserted coverage in this matter."²

All the parties recognize that the Board's review from a preliminary hearing is limited. K.S.A. 44-534a restricts the jurisdiction of the Board to consider appeals from preliminary hearing orders to the following issues:

- (1) Whether the employee suffered an accidental injury;
- (2) Whether the injury arose out of and in the course of the employee's employment;

following a preliminary hearing Order, that issue was not briefed by respondent. Instead, respondent's entire argument is premised upon the ALJ exceeding his jurisdiction in *failing* to conclude that there is coverage for the claimant's repetitive series of accidents and awarding benefits against respondent *and its insurer*.

² Respondent's Brief at 3 (filed May 29, 2008).

- (3) Whether notice is given or claim timely made;
- (4) Whether certain defenses apply.

These issues are considered jurisdictional and subject to review by the Board upon appeals from preliminary hearing orders. The Board can also review a preliminary hearing order entered by an ALJ if it is alleged the ALJ exceeded his or her jurisdiction in granting or denying the relief requested.³

Here, there is no dispute that none of the 4 issues delineated above are presently before the Board. Although the respondent's allegation at the preliminary hearing that a previous injury is responsible for claimant's present physical complaints, thus triggering the question of whether the present complaints arose out of and in the course of claimant's employment, that issue was not briefed to the Board. Even if one overlooks respondent's failure to argue the jurisdictional point, the ALJ noted that claimant's present complaints related to bilateral carpal tunnel syndrome and his earlier motor vehicle accident involved complaints to his neck. Thus, his finding that claimant was entitled to medical treatment is based upon the finding that claimant's present complaints arose out of and in the course of his employment rather than the earlier accident. And based upon this record, that finding is affirmed.

Turning now to respondent's primary issue on appeal, the contention that the ALJ exceeded his jurisdiction in failing to find coverage for this accident, this Board Member finds the ALJ did not exceed his jurisdiction and therefore, the appeal must be dismissed.

Respondent's argument seems to be that the ALJ has jurisdiction only to rule that there *is* coverage in this matter and to the extent that he has found there to be *no* coverage, he exceeded his jurisdiction and his decision should be reversed.

The Board has consistently held that it has no jurisdiction to delve into coverage disputes at this juncture of the claim.⁴ Respondent's reference to *Scheidt*⁵ is not helpful to its cause. *Scheidt* involved a claimant who was seeking medical benefits but was faced with a dispute as to which of two employers (and their carriers) would be liable for the benefits. The dispute stemmed from the questions of date of accident and whether there had been a new accident. Adding to the complexity of the issues was the contention by

³ See K.S.A. 44-551.

⁴ See *Madrigal v. Peddlers Inn*, No. 213,277, 1998 WL 599417, (Kan. WCAB Aug. 31, 1998); *Irigoyen v. Moreno's Framing Company*, No. 1,007,684, 2003 WL 21087622, (Kan. WCAB Apr. 30, 2003); *Newberry v. Laforge & Budd Construction Company*, No. 250,386, 2002 WL 433110, (Kan. WCAB Feb. 27, 2002).

⁵ *Scheidt v. Teakwood Cabinet & Fixture, Inc.*, No. 1,021,836, 2006 WL 1275454, (Kan. WCAB Apr. 25, 2006).

one of the carrier's that there was no coverage for one of the purported dates of accident. Implicit in the decision as to date of accident is the question of whether there is coverage and which carrier is involved. But beyond that threshold question, the Board does not get involved. That is a contractual matter wholly independent of the Workers Compensation Act.

Similarly, the statutory references to K.S.A. 40-2212 and 44-559 are not pertinent to this issue. Those statutes only govern the required provisions for workers compensation policies, something wholly outside the purview of the Board.

For the foregoing reasons, this Board Member finds the ALJ did not exceed his jurisdiction in failing to find that there was no coverage for claimant's claim. And because he did not exceed his jurisdiction there is no further action the Board can take. This matter must be dismissed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated April 23, 2008, is affirmed in part and dismissed in part.

IT IS SO ORDERED.

Dated this ____ day of July 2008.

JULIE A.N. SAMPLE
BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent
Blake Hudson, Attorney for Nationwide Mutual Insurance Co.
Kenneth J. Hursh, Administrative Law Judge

⁶ K.S.A. 44-534a.